SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, Petitioner (Libelant below), *against* UNITED STATES OF AMERICA, Respondent (Respondent below).	October Term, 1923 No. ——

SIR:

PLEASE TAKE NOTICE that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals, for the Third Circuit, will be submitted to the Supreme Court of the United States on the opening of court on the 1st day of October, 1923, or as soon thereafter as counsel can be heard.

Dated, New York, September 13, 1923.

JOHN M. WOOLSEY,
CHARLES T. COWENHOVEN,
Proctors for Petitioner.

To

WALTER G. WINNE, Esq.,
United States Attorney,
Proctor for Respondent.

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, Petitioner (Libelant below), *against* UNITED STATES OF AMERICA, Respondent (Respondent below).	October Term, 1923 No. ——

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the Standard Oil Company of New Jersey, a New Jersey corporation, as owner of the steamship *Llama*, alleges and respectfully shows to this Honorable Court, as follows:

STATEMENT.

The Decision Below.

1. The decision which the Petitioner seeks to review was rendered on the 6th day of July, 1923, by the Circuit Court of Appeals for the Third Circuit, in reversing a

final decree of the United States District Court for the District of New Jersey in Admiralty, which had been given in favor of the Petitioner against the United States of America in the sum of $220,105.73.

The case was heard in the District Court by Judge Lynch.

The opinion of the Circuit Court of Appeals was rendered by Buffington, Circuit Judge, with whom McKeehan, District Judge, concurred. Davis, Circuit Judge, filed a dissenting opinion.

Of the four Judges who have heard the case, two have found for the Petitioner and two have found for the respondent.

The Pleadings.

2. The libel herein was filed by the Standard Oil Company of New Jersey against the United States, under the Act of Congress of September 2, 1914, entitled "*An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department*".

The libel stated two causes of action based upon two separate policies of War Risk insurance issued by the War Risk Bureau of the Treasury Department on October 8, and October 16, 1915, respectively, to the Petitioner on the hull and freight of steamship *Llama*, on a voyage from New York to Copenhagen, via Kirkwall. The steamer became a total loss in the course of the voyage insured against while being taken into Kirkwall by a British Prize Crew placed on board by a British Cruiser.

The perils insured against were alike in both policies. The paragraph enumerating them reads (Italics ours):

> "Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are men-of-war, letters of marque and countermarque, surprisals, *takings at sea, arrests, restraints* and *detainments of all kings, princes and peoples of what nation, condition or quality, soever, and all consequences of hostilities or warlike operations,* whether before or after declarations of war".

The Questions Involved.

3. The issue involved in this case is whether the United States, as war risk underwriter, or the Petitioner as *owner,* should bear the loss of the American Tanker *Llama* sunk on October 31, 1915, in the vicinity of the Skerries off the coast of Scotland when she struck a submerged rock while being taken into Kirkwall for examination and possible prize proceedings by a British prize crew.

The *Llama* had been stopped by a British cruiser two days previously, which placed on board a British prize officer and four armed men with instructions to the Prize Officer to *"proceed to Kirkwall, keeping to the northward of Scule Skerries and North Rona"* and *"not to pass between the islands between the hours of darkness."*

The Circuit Court of Appeals found that the loss resulted from "following a course in which both the Captain and the British Officer concurred"; that "the stranding was the dominant causal factor of the loss"; and that

"the stranding, if the contemporaneous evidence of the loss be accepted, resulted from the conjoint but mistaken navigation of the Captain and the British Officer."

It is of great commercial importance to the public, shippers, underwriters and steamship owners, to have definitely determined whether the stoppage by a belligerent of neutral vessels bound for a neutral port, carrying non-contraband, and the placing on board of such vessels armed Prize Crews for the purpose of taking the vessels into a belligerent port for examination and possible prize proceedings, makes the voyage into that belligerent port the risk and adventure of the belligerent and hence a war risk, or the risk and advanture of the owner and hence a marine risk.

The Facts.

4. The tanker *Llama* sailed from New York on October 24, 1915, bound for Copenhagen, via Kirkwall. When about 400 miles west of the Orkney Islands, she was stopped by the British cruiser *Virginia* and boarded by a British Prize Crew consisting of a Naval Lieutenant and four armed men. The Prize Officer examined the ship's papers and manifest, which showed the ship was bound for Copenhagen via Kirkwall. He thereupon signalled the result of his investigatoin to the cruiser, who gave him orders to proceed with the ship to Kirkwall. *Cox*, p. 102.

The cruiser *Virginia* specifically directed Cox, the Prize Officer, to *"proceed to Kirkwall, keeping to the northward of Scule Skerries and North Rona"* and added, *"You are not to pass between the islands during the hours of darkness."* After receiving these orders from

the cruiser, Cox testified that he turned to the captain, who was in the chart house and *"told him that orders had come through as to the course to steer"*.

Cox stationed his armed men at convenient places about the ship to see that his orders were carried out. He had an armed man on the bridge at all times.

It will be seen therefore from the undisputed facts, that the Prize Officer, by order of the cruiser, compelled the captain to proceed to Kirkwall by a specific course and forbade him to pass through the islands during the night. The control of the voyage at the very outset was thus taken out of the hands of the master of the *Llama*.

In practically an identical case in which the Circuit Court of Appeals for the Second Circuit reached an opposite result from the Court below, Hough, C. J., describing a similar situation in *Muller* vs. *Insurance Company*, C. C. A. 2nd Circuit, 246 Fed. 759, 763, said:

> "That the *Canadia* and her cargo was seized, arrested and detained within the meaning of the policy we think too plain to require more than mention."

It is also undisputed that Cox checked over the course laid out after leaving the cruiser *"to see that it complied with my orders from my Captain."* *Cox*, p. 103.

The Prize Officer admitted that it was his duty to take the *Llama* to Kirkwall *"by the safest route"* and *"with all dispatch"*, and that his orders from the British Government were to the effect that "the master should be given the special route to be followed", but not to interfere with the details of navigation unless necessary.

Cox also admitted that he realized that the *Llama* might be the subject of Prize Court proceedings, and that he was representing the interests of the British Government at least to the extent *"that I am to see that she* (the *Llama*) *gets to Kirkwall"*. *Cox*, p. 118.

In accordance with the cruiser's order to the Prize Officer Cox, *"not to pass through the islands during the hours of darkness"*, which order Cox communicated to the Master, the *Llama* lay off the entrance to Westray Firth during the night of October 30th. On the next morning, while the *Llama* was proceeding through Westray Firth, she struck a submerged reef and stranded and became a total loss.

The prevailing opinion of the Circuit Court of Appeals found that the stranding and loss resulted from following a course in which both the captain and British Officer concurred and considered safe.

The Circuit Court of Appeals said:

> "The stranding was the dominant causal factor of the loss; and that stranding, if the contemporaneous evidence as to the loss be accepted, resulted from the conjoint but mistaken navigation of the Captain and the British Officer."

The Opinion of the District Court.

5. All the testimony in the case was taken by deposition.

The only important conflict in the evidence was whether the final course through Westray Firth was taken

by the direction of the British Prize Officer alone, or was selected jointly by the British Prize Officer and the master of the *Llama*.

It is submitted that the master's concurrence in the course cannot be material if the vessel was under "*seizure, restraint and detention*" and the Prize Officer was in charge of the vessel.

It is a question of control of the vessel and not who was performing the duties imposed by the person having control. The Prize Officer necessarily made use of the ship's crew. Upon the seizure the master, engineers and crew became Cox's agents.

The District Court found that the final course through the Westray Firth was selected solely by the British Naval Officer.

The Circuit Court of Appeals reversed this finding and found that the course was *jointly* selected by the British Prize Officer and the master of the *Llama*.

The District Court held that there had been a loss by "taking at sea, arrest, restraint and consequence of hostilities within the meaning of the policy". Judge Lynch thus stated his conclusion, p. 166:

> "There was no time when the ship's master was left to navigate the ship in his own way; she was lost while he was doing what he had to do."
>
> "The *Llama* was all the time in the grip of the captor and of its armed representative, whose control never ceased but efficiently caused the loss. After the seizure, the adventure of taking the ship

into Kirkwall was that of the British Naval authorities and the risk and responsibility of it was theirs."

Opinion of the Circuit Court of Appeals.

6. The majority opinion of the Circuit Court of Appeals took the view that the loss of the ship could not be considered a war risk because although the master and crew of the steamer were under the Prize Officer's orders, the Prize Officer was not personally navigating the ship through the Westray Firth at the time of the stranding although he had examined and approved the course which put the ship on the rocks and considered it safe.

As Judge Davis pointed out in his dissenting opinion:

> "There is no question about the fact that Lieutenant Cox was the absolute master of the vessel. He admits it and everybody on the vessel knew it."

It seems a little difficult to understand how the voyage, after the seizure by the Prize Crew, became any less the adventure of a belligerent Government because Cox and the master made a joint mistake as to a proper course.

The real test as to responsibility in the last analysis would seem to be who was the supreme master of the vessel.

Either the Prize Officer was aboard the *Llama* with his four armed men as a war measure adopted by the British Government to take the vessel into Kirkwall, at all costs, or he and his four armed men were on board

the *Llama* as passengers merely for the pleasure of the ride.

The following undisputed facts testified to by Prize Officer Cox when called as a witness for the United States, show conclusively what his status was on board the *Llama*.

A. On October 29, 1915, the *Llama* was stopped by the British Cruiser *Virginia*, about four hundred miles west of the Orkney Islands. *Cox*, p. 101.

B. Prize Officer Cox with four armed men went aboard the *Llama*, examined the ship's papers and manifest and signalled the result of the investigation to the cruiser. *Cox*, p. 102.

C. The British Prize Officer thereupon received the following instructions, *Cox*, p. 102 (Italics ours):

> Q. Were any directions given *you* then as to any *course* or *where you were to proceed to?*
>
> A. It was sent by semaphore.
>
> Q. Did you read the semaphore yourself?
>
> A. I personally read the semaphore myself.
>
> Q. Tell us what the message was as near as you recall it.
>
> A. As near as I recall it, it was *'Proceed to Kirkwall, keeping to the northward of Scule Skerries and North Rona'*. I think these two places were the other way around if I recall it to mind. *'You are not to pass between the islands between the hours of darkness.'*
>
> Q. Now after the messages had been passed between the *Virginia* and yourself, what next followed?

A. I turned to the captain who was on the bridge and we went to the chart house as near as I can remember *and I told him orders had come through as to the course to steer.*

D. Prize Officer Cox then examined the ship's course "to see that it complied with my orders from my Captain". *Cox,* p. 103.

E. Prize Officer Cox was on the bridge with an armed man at the time the course through Westray Firth was set and the vessel was lost.

F. Prize Officer Cox admitted, and the Circuit Court below found, that he helped select, approved and considered safe the final course through the Westray Firth.

G. Prize Officer Cox realized that the *Llama* might be the subject of prize court proceedings and that he was representing the interests of his own Government, at least to the extent *"that I am to see that she goes to Kirkwall". Cox,* p. 118.

H. Cox admitted that it was his duty to see that the *Llama* proceeded "by the safest route" with respect to danger by submarines and at the same time place the vessel at Kirkwall "with all dispatch". *Cox,* pp. 118, 119.

In performing his admitted duty of "seeing that the ship gets to Kirkwall", it was, of course, impossible for Cox personally to run the engines, steer the ship, keep the watches, cook the meals for the crew and for himself,

and personally perform the other duties necessary to take the ship into Kirkwall. But the fact remains that the Prize Officer's orders, whether they took the form of a positive or negative direction or an acquiescence in some act that the master, or engineer or other member of the crew was performing, were supreme and were recognized as such.

As Judge Davis pointed out in his dissenting opinion "*Lieutenant Cox was the absolute master of the vessel*".

The Circuit Court of Appeals thought that because the final course through the Westray Firth was the result of the joint mistaken judgment of the Prize Officer and the master, and that the Prize Officer was not personally navigating the vessel at the time of the stranding, that the fact prevented the loss from being a war risk.

The majority opinion of the Circuit Court of Appeals stated its conclusion as follows:

> "The view we have taken of the situation, namely: that the libelant has not satisfied us that the *Llama* was being navigated by the British Officer when she stranded, renders it needless to refer to the many authorities cited, all of which have had our careful examination."

It seems to us, with all respect, that the Court below completely missed the point.

The determining factor cannot be whether Cox was personally conducting the navigation. The true test is who was in control of the vessel. If Cox chose to use the owner's master and engineer for his own purposes, the responsibility still remained his.

What happened here was exactly what happened in *Muller* vs. *Insurance Company,* C. C. A. 246 Fed. 759. In that case the British Naval Officer and the master of the *Canadia,* which was similarly being taken into Kirkwall, "*consulted*" as to a course and made a joint miscalculation of about 12 miles, with the result that the vessel ran ashore and was a total loss.

The loss was held to be a war risk.

It is, of course, obvious that the hazard of a marine underwriter on a vessel in the supreme charge of an experienced master becomes a very different risk after a belligerent places over that master, as a war measure, a young naval lieutenant, twenty-two years old, with authority and power to dictate with respect to the movement of the vessel for the purpose of taking the vessel into a belligerent port.

5. *Reasons why the writ should be granted.*

A. The decision of the Circuit Court of Appeals below is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Muller* vs. *Insurance Company,* 246 Fed. 759.

The decision is also in direct conflict with the decisions of the leading English cases. *Andersen* vs. *Marten,* (1908) Appeal Cases 334, and cases cited therein.

B. The question of what constitutes a war risk as opposed to a marine risk in marine insurance is one of great commercial importance. It has been considered in one form or another in at least six cases in the British House of Lords. It has not been discussed or passed upon by this Court.

This Court has however granted a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to re-

view the case of *Queen Insurance Company of America* vs. *Globe & Rutgers Fire Insurance Co.*, October Term, #579. That case involves the question of whether the loss of the cargo of the Italian steamer Napoli, which was sunk by collision on July 4, 1918, while proceeding under convoy of British, Italian and American warships, should be borne by the marine underwriters or by the war risk underwriters. With these two cases before it this Court can settle finally the hitherto somewhat vague boundary between Marine and War losses in the law of Marine Insurance.

C. The practice of belligerents during the late war of stopping neutral vessels bound for neutral ports carrying non-contraband, and placing on board thereof prize crews for the purpose of taking the vessels into a belligerent port for examination and possible prize proceedings, constituted new trading conditions and risks. Until it is definitely determined whether losses occurring during such "takings" are for the account of the war risk underwriters or marine underwriters, both underwriters can be depended upon to include a charge for the risk in their premiums with the result that steamship owners and the public will have to pay twice for the same risk.

Uniformity Important in Commercial Cases.

D. It is important to have uniformity of decision on a commercial question such as this because on any substantial risk there will be both American and British underwriters.

The Petitioner avers that these questions are sufficient to justify the exercise by this Court of the jurisdiction

vested in it to issue a *writ of certiorari* requiring the case to be brought here for review from the Circuit Court or Appeals.

The Petitioner herewith presents a certified copy of the transcript of record of all proceedings in the District Court and the Circuit Court of Appeals herein.

WHEREFORE your Petitioner respectfully prays that a *writ of certiorari* may be issued out of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding such Court to certify and send to the Supreme Court for its review and determination on a day certain to be therein designated, and file a complete transcript of the record of all proceedings in said Circuit Court of Appeals in said case entitled "Standard Oil Company of New Jersey, Libelant-Appellee, against United States of America, Respondent-Appellant" pursuant to Section 240 of the Judicial Code, and that the said decree of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and in conformity with said Code.

Your petitioner will ever pray, etc.

CLETUS KEATING,
JOHN M. WOOLSEY,
Counsel for Petitioner.

JOHN M. WOOLSEY,
CHARLES T. COWENHOVEN,
Proctors for Petitioner,
27 William Street,
New York City.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN M. WOOLSEY, being duly sworn, says: I am one of the Proctors for the petitioner herein. I have read the foregoing petition and know the contents thereof and the same is true to the best of my knowledge, information and belief.

JOHN M. WOOLSEY.

Sworn to before me this 13th day of September, 1923.

WM. O. GODDARD,
Notary Public, Kings County,
Certificate filed in New York County.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Court. It is not filed for the purpose of delay.

CLETUS KEATING,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY OF NEW JERSEY, Petitioner, (Libelant below) *against* UNITED STATES OF AMERICA, Respondent, (Respondent below).	October Term 1923 No. .....

BRIEF FOR THE PETITIONER.

The facts are summarized in the petition.

The risks undertaken in the policy are as follows:

> "Takings at sea, arrest, restraint and detainments of Kings, Princes and peoples of what nation, condition or quality soever and all consequences of hostilities or warlike operations".

The admitted facts show that there was *"a taking at sea", "an arrest", "a restraint"* and *"a detainment"*.

The facts further show that as a consequence of these perils, which the United States had expressly assumed, the *Llama* was taken out of the possession and control of her owner by the British Navy and destroyed while in the possession of a British Prize Crew.

POINT ONE.

TAKING THE SHIP INTO KIRKWALL WITH A NAVAL PRIZE CREW WAS THE ENTERPRISE OF THE BRITISH GOVERNMENT; THE NAVIGATION OF THE SHIP AFTER THE "SEIZURE" AND "RESTRAINT" WAS FOR THEIR ACCOUNT AND RISK; AND THE LOSS OF THE SHIP WAS THE PROXIMATE RESULT OF THE SEIZURE AND RESTRAINT.

Parsons, C. J. in the Massachusetts case of *Richardson* vs. *Marine Insurance Company*, 6 Mass. 101, defined "restraint and detainment", at page 108, as follows:

> "For in this instrument I know of no difference between the import of restraint and detention. They are respectively the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained; and whenever she is detained, she is under restraint. Neither have I found a book or case, relating to insurances, in which a different construction has been given to these words."

It cannot be material that the *Llama* was bound for Kirkwall in any event, or that it might have been the intention to touch at Kirkwall en route to the *Llama's* destination (Copenhagen) since there was not any reason why the master of the *Llama* could not have exercised the discretion of deviating if he had been left in the control of the vessel.

In the case of *Magoun* vs. *New England Marine Ins. Co.* (1840), (1 Story 157, 3 Law Rep. 127) 16 Fed. Cas. page 483, Case No. 8961, which was a suit upon a policy of insurance against usual risks, the declaration alleged

a total loss by arrest and detainment by the authorities of the Republic of New Granada, and also a total loss by the peril of the seas. It seems that the schooner when about to leave port was seized and taken into the possession of the local authorities, on account of a supposed violation of trade regulations. It subsequently developed at the trial that while the master was subject to penalty, the vessel was not subject to any forfeiture, and was accordingly restored to her owners' possession. Owing to her long exposure to the weather during the interim, she deteriorated and her cargo was also destroyed, whereupon the owners abandoned the vessel and freight to the underwriters, who, however, declined to accept the abandonment.

After discussing the question of proximate cause of the loss, Mr. Justice Story stated at p. 486, as follows (Italics ours):

> "All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. *If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear that the whole loss is properly attributable to the capture.* It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils. The decision of the Supreme Court of the United States in Peters *vs.* Warren Ins. Co. (at the last term), 14 Pet. (39 U. S.) 99, is directly in point; and in my judgment fully settles, that *the restraint and de-*

tainment under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage."

In *Muller* vs. *Insurance Company,* 246 Fed. 759, the *Canadia,* was bound to Kirkwall, by way of the route northward of the Orkneys and Shetlands, when she was stopped by the British cruiser *Hilary,* which sent an armed party on board and ordered the steamer to proceed by the passage between the *Orkneys* and *Shetlands.* The passage was made at night. A course was taken which should have carried the vessel clear of Fair Island by about 12 miles. This course was adopted "after consultation" between the British Naval Officers from the *Hilary* and the master of the *Canadia;* and the course was similarly changed, but as the event proved the change of course was premature and the *Canadia* grounded and became a total loss.

These facts are almost exactly similar to the established facts in the present case.

Suit was brought on policies of insurance protecting against war risk only, the perils insured against being substantially the same as those in the policies in question in the present case.

The Circuit Court of Appeals (2nd Circuit) affirming the decision of the U. S. District Court (S. D. N. Y.) held that the loss was due to war risk covered by the policies, and rejected the contention as to stranding being the proximate cause.

Circuit Judge Hough stated:

> "Thus we find no intervening cause, breaking the causal connection between the control assumed by the *Hilary* boarding party and the loss of the ship. There was no time when the shipmaster was left to navigate his own ship in his own way; she was lost while he was doing what he had to do."

In *Andersen* vs. *Marten,* (1908) Appeal Cases 334, suit was brought upon a policy insuring the steamship *Romulus* against loss by perils of the seas, which contained the following clause: "Warranted free from capture, seizure and detention, and the consequences of hostilities".

The *Romulus,* a German vessel sailed, during the currency of this policy, for a Russian port with a cargo of coal which had been proclaimed contraband of war. In order to avoid Japanese cruisers the *Romulus* took a circuitous course to the north and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. Some 30 or 40 miles from that port the *Romulus* was stopped by a Japanese cruiser, and was boarded by a Japanese officer and an armed guard. The Japanese officer ordered the master of the *Romulus* to proceed to Hoskosuka, but the vessel made much water, and altering her course went aground, and ultimately she became a total loss.

The plaintiff (appellant) claimed and it was argued that the proximate cause of the loss was a peril of the sea, and that there was not any relation back to the date of the seizure; it being contended that the *Romulus* was a neutral ship and there was not any property in the vessel until condemnation, although it was admitted that the captors had rights *in rem.*

It was argued on behalf of the defending underwriter, on the other hand, that the loss was due to "capture, seizure or consequences of hostilities" despite the immediately promoting cause, which related back to the date of seizure; and the following cases in support of this doctrine of relation back were cited: *Goss* vs. *Withers* (1758) 2 Burr, 683; *Hamilton* vs. *Mendes* (1761) 2 Burr. 1198, 1211; *Dean* vs. *Hornby* (1854) 3 E. & B. 180; *Cory* vs. *Burr* (1883) 8 A. C. 393, 398; *Ruys* vs. *Royal Exchange Assurance Corporation* (1897) 2 Q. B. 135.

The House of Lords held that there was a total loss within the exceptions of the policy when the vessel was stopped by the Japanese cruiser, and that the underwriters (on marine risk) were not liable, although the final destruction of the vessel was due to a peril of the seas.

The Lord Chancellor (Lord Loreburn) said at page 338:

> "The real question is whether there was a total loss by capture, seizure or detention, or the consequences of hostilities. I think there was in this case a total loss by capture on February 26th to say nothing of the other words, namely seizure, and so forth. That was the day on which the *Romulus* was seized lawfully, as appears by the subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released."

Lord Halsbury agreed that there was a total loss from the time the boarding party took possession of the *Romulus*, and he commented on the case of *Goss* vs. *Withers*, (2 Burr. 683) at page 340, as follows, (Italics ours):

"This very question arose just 150 years ago in *Goss* vs. *Withers,* and was argued before Lord Mansfield, and he observed that a large field of argument had been entered into, and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws. After taking time to consider, the learned judge, delivering the judgment of the whole Court on November 23, 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected the change in property, he said: '*But whatever rule ought to be followed in favor of the owner against a recaptor or vendee it can in no way affect the case of an insurance between the insurer and insured.* * * * *The ship is lost by the capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value.*' If after condemnation the owner recovers or retakes her the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; *the insurer runs the risk of the insured and undertakes to indemnify.* He must therefore bear the loss actually sustained."

It is to be emphasized that the rule of relation back and right of abandonment as laid down by Lord Mansfield in the earlier cause of *Goss* v. *Withers* (1758), 2 Burr 683, and quoted with approval by Lord Halsbury as above, is equally applicable whether or not condemnation should follow the seizure. In other words, as be-

tween insurer and insured, the loss arises unconditionally under the policy at the moment of seizure.

Although the case of *Cory* v. *Burr* (1883), 8 A. C. 393, supra, involved circumstances which distinguish it from the present case, and the policy there contained a *warranty* "free from capture and seizure and the consequences of any attempts thereat", the decision reached applies inversely and the expressions of Lord Blackburn, in his opinion, are pertinent, in clearly stating that the loss would have been attributable to the seizure but for the exception. He said at p. 398 (Italics ours):

> "The policy here is in the ordinary Lombard Street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured. Many of these, as for instance men-of-war, enemies, pirates, rovers, and I may add barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get their property back; *Dean* v. *Hornby*, 3 E. & B. 180. *There are other perils such as takings at sea, arrests, restraints and detainments of princes, which from their nature involve such a taking of the subject insured out of the control of the owners.* That being the case, supposing there had been no warranty at all, was there a loss here which would be one for which the under-

writers would be liable? Upon the facts stated I cannot doubt it."

The case of *Ruys* vs. *Royal Exchange Assurance Corporation* (1897), 2 Q. B. 135, was one in which suit was brought under a policy of insurance against war risks. The vessel had been captured by an Italian cruiser while carrying a cargo of ammunitions to Abyssinia, which was at war with Italy. A few days after the capture the plaintiffs, owners of the vessel, gave notice of abandonment. Although the vessel was later declared lawful prize, the war being at an end, she was ordered to be restored to her owners, which was done. The question then arose as to the effect of such restoration on the pending suit under the policy, and the Court held that the owners were entitled to recover as for a total loss. That case also supports the doctrine of relation back to the seizure, and the right to abandon at that moment, despite the outcome of seizure in respect of ultimate title to the vessel.

In *Leyland Shipping Co. Ltd.* vs. *Norwich Union Fire Ins. Co. Ltd.* (1918), A. C. 350, where the steamship *Ikaria* was insured against perils of the seas with a warranty against consequences of hostilities, a suit arose by reason of the loss of the *Ikaria* after having been torpedoed by a German submarine. The *Ikaria* was placed alongside a dock in Havre, and a gale having sprung up, she was removed inside the outer breakwater. She later sank. The question then arose as to what was the proximate cause of her loss, whether it was the original torpedoing of the vessel, or the gale. The Court held that the real cause was the torpedoing.

Lord Shaw of Dunfermline said, in discussing the proximate cause of the loss, at p. 371:

> "The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold."

Similarly, in the present case, the *Llama* was all the time in the grip of the captor, and of its armed representatives, whose control never ceased, but efficiently caused the loss.

After the seizure, the adventure of taking the ship into Kirkwall was that of the British Naval authorities, and the risk and responsibility of it was theirs. The result was as in the case of *Andersen* vs. *Marten*, (1908) A. C. 334, that the shipowners lost their ship by arrest and seizure and the captors lost their capture by stranding.

It is submitted that the loss of the *Llama* having occured while in the possession and control of the British Government, whose act constituted "an arrest, restraint and detainment" as "a consequence of hostilities" within the meaning of the policy, the Petitioner is thereby entitled to indemnification from the respondent as for a total loss *ab initio* under the foregoing authorities.

It was contended in the Court below and the Circuit Court of Appeals found that the loss was not proximately caused by the seizure, but was the result of ordinary sea peril not covered by the policies.

We reiterate that under the principles of the law of insurance as laid down by the cases cited above, it is immaterial as between the insurer and the insured, what might have been the immediate cause of the loss. Since

the loss took place after the seizure and while the vessel was under the control of and in the possession of the British Governmental representatives, the loss was primarily the loss of the British Government, for which possibly it may be required to account to the United States as underwriter, when it has paid the amount due under the policies and becomes entitled to an underwriter's subrogation.

Conclusion.

There is presented in this case the flat question of whether the destruction of a neutral vessel, carrying non-contraband, following the stoppage of such vessel by a belligerent during a state of war and the placing on board of such vessel of an armed prize crew for the purpose of taking the vessel into a belligerent port for examination and possible prize proceedings, constitutes a loss by "*seizure, restraint and detention*" within the meaning of a war risk policy when the final destruction of the vessel took place while in possession of the prize crew, and was caused, at least in part, by the personal negligence of the prize officer in selecting and approving an unsafe course.

It is urged, therefore, that this is a proper case for the issuance of a *writ of certiorari.*

Respectfully submitted,

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